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DANIEL J. O'HANLON, State Bar No. 122380
 REBECCA R. AKROYD, State Bar No. 267305
 ELIZABETH LEEPER, State Bar No. 280451
 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
 A Professional Corporation
 400 Capitol Mall, 27th Floor
 Sacramento, California 95814
 Telephone: (916) 321-4500
 Facsimile: (916) 321-4555

Attorneys for Defendant-Intervenors, SAN LUIS
 & DELTA-MENDOTA WATER AUTHORITY
 and WESTLANDS WATER DISTRICT

[Others?]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
 COUNCIL, BAY.ORG d/b/a THE BAY
 INSTITUTE, AND DEFENDERS OF
 WILDLIFE

Plaintiffs,

v.

GINA MCCARTHY, in her official capacity as
 Administrator of the United States
 Environmental Protection Agency; JARED
 BLUMENFELD, in his official capacity as
 Regional Administrator of the United States
 Environmental Protection Agency Region IX,

Defendants.

Case No. 3:16-cv-02184

**MEMORANDUM IN SUPPORT OF THE
 SAN LUIS & DELTA-MENDOTA WATER
 AUTHORITY AND WESTLANDS WATER
 DISTRICT'S MOTION TO INTERVENE**

Judge: Hon. ***
 Date: ***
 Time: ***
 Crtrm.: ***

DRAFT**I. INTRODUCTION**

The San Luis & Delta-Mendota Water Authority (“Authority”) and Westlands Water District (“Westlands”) (together “Proposed Intervenors”) seek to intervene in this action and join with the Defendants in defending against Plaintiffs’ claims. Proposed Intervenors serve water users who depend water provided by the federal Central Valley Project (“CVP”) for agricultural, municipal and industrial, and wildlife refuge uses in the San Joaquin Valley and Bay Area.

In this lawsuit, Plaintiffs contend that the United States Environmental Protection Agency (“EPA”) was required by Section 303 of the Clean Water Act (“Act”), 33 U.S.C. § 1313 to review and approve emergency water rights orders issued by the California State Water Resources Control Board (“Water Board”) regarding the water rights for the CVP. The orders temporarily amended state-issued water rights permits for the CVP, in response to extraordinary drought conditions in 2014 and 2015. Plaintiffs contend, erroneously, that the orders amended water quality objectives in state plans, and hence were subject to EPA review and approval of water quality standards under Section 303.

The water right permit amendments allowed by the orders have expired. Plaintiffs, however, seek declaratory relief that Defendants violated the Act by not reviewing the Water Board’s orders, and injunctive relief requiring Defendants to review such orders in the future and to “notify” the Water Board that such amendments to CVP water rights must be reviewed and approved by EPA before being implemented. The rulings and relief Plaintiffs seek would impair the ability of the Bureau of Reclamation to seek, and the Water Board to allow, temporary changes to water rights conditions in response to circumstances such as the drought, to the detriment of the CVP’s ability to best meet its multiple purposes, including providing water supply. Proposed Intervenors’ vital interests in CVP water supplies are therefore at stake in this action.

Proposed Intervenors meet the requirements of Federal Rule of Civil Procedure Rule 24(a) for intervention as of right. This motion is timely. The Proposed Intervenors’ interests in CVP water supplies, recognized by contract and statute, are legally protectable interests that support intervention. Disposition of this action in the Proposed Intervenors’ absence may impair or

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1 impede their ability to protect their interests. The Proposed Intervenor's interests cannot be
2 adequately represented by any existing party to this action. Accordingly, Proposed Intervenor's
3 should be granted leave to intervene as of right under Rule 24(a). In the alternative, Proposed
4 Intervenor's should be granted permissive intervention under Rule 24(b).

5 **II. STATEMENT OF FACTS**

6 **A. The Central Valley Project**

7 The CVP is the nation's largest water storage and transport system, bringing water from
8 areas of California where supply is plentiful but demand is low, to regions where demand is great
9 but supplies are lacking. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-29 (1950).
10 The CVP was originally conceived by the State of California, but was ultimately constructed by
11 the federal government. *Id.* The federal Bureau of Reclamation owns the CVP facilities. *Central*
12 *Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002). The main features of the
13 CVP include reservoirs upstream of the Delta to store and regulate water, pumps located in the
14 south Delta,¹ and canals to transport water pumped at the Delta, including the Delta-Mendota
15 Canal. Declaration of Jason Peltier in Support of Motion to Intervene ("Peltier Decl.") at ¶ 4.
16 CVP pumping facilities in the Delta include the Jones Pumping Plant located near the city of
17 Tracy. *Id.*

18 The Water Board has issued water rights permits and licenses to Reclamation for the CVP,
19 and regulates Reclamation's exercise of those rights. *See* Peltier Decl. at ¶ 8. In Revised Water
20 Rights Decision 1641, issued March 15, 2000, the Water Board imposed amended conditions on
21 CVP water rights. Revised Water Rights Decision 1641, Exh. 7 to Declaration of Elizabeth L.
22 Leeper in Support of Request for Judicial Notice ("Leeper Decl."). These water rights conditions

23
24 ¹ The Delta includes 57 islands, 1,100 miles of levees and many acres of marshes, mudflats
25 and farmland. It provides habitat for migratory and warm water fish and shelter for aquatic birds
26 and waterfowl – some of which appear on federal/state lists of rare, threatened or endangered
27 species. The Delta watershed provides drinking water to millions of Californians and irrigation
28 water to millions of acres of farmland, and channels within the Delta are used to convey water
stored in project reservoirs in the wet season and later released for pumping in the southern Delta.
The California Water Code provides a legal description of the boundaries of the Delta. Cal. Wat.
Code § 12220.

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1 require Reclamation to operate the CVP to maintain salinity below specified levels at various
 2 points in the Delta (expressed as electrical conductivity), maintain certain minimum flows in the
 3 Delta and in specified rivers, to limit pumping, and to seasonally open and close the gates in the
 4 Delta Cross Channel at Walnut Grove. *Id.* These conditions implement water quality objectives
 5 established in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin
 6 Delta Estuary (“Bay-Delta WQCP”); the water quality objectives are listed in Tables 1, 2 and 3
 7 attached to the Water Board’s Revised Water Rights Decision 1641. *Id.* Operating the CVP to
 8 meet these conditions can require Reclamation to limit CVP diversions to storage, make releases
 9 from CVP storage, and limit pumping at the Jones Pumping Plant in the south Delta. Peltier Decl.
 10 at ¶ 8. The CVP operations necessary to meet these conditions may and often do reduce the
 11 volume of CVP water available for delivery to members of the Authority. *Id.*

12 The Bay-Delta WQCP identifies beneficial uses of the waters within the Delta, water
 13 quality objectives for reasonable protection of those uses, and a program of implementation to
 14 achieve the objectives. *See* Bay-Delta WQCP, Exh. 5 to Leeper Decl. The Bay-Delta WQCP is a
 15 planning document; it does not itself impose any legal requirements upon Reclamation or the
 16 CVP. *Id.* That comes only with implementation. Under California law, every water quality
 17 control plan must include a program of implementation describing the actions needed to achieve
 18 the water quality objectives in the plan. Cal. Water Code, §§ 13050(j)(3), 13242. The program of
 19 implementation in the current Bay-Delta WQCP relies upon a combination of the Water Board’s
 20 exercise of its water rights and water quality certification authorities (e.g. as in Revised Water
 21 Rights Decision 1641), Water Board actions in concert with other agencies, recommendations to
 22 other agencies for action, and ongoing studies. *See* Exh. 5 to Leeper Decl. As this program of
 23 implementation recognizes, the water quality objectives in the Bay-Delta WQCP cannot be
 24 achieved through exercise of the Water Board’s water rights authority over the CVP alone. For
 25 example, many actions to improve fish and wildlife uses “involve improvements to habitat
 26 conditions both inside and outside of the Estuary, many of which are under the authorities of other
 27 agencies, as well as studies needed to better understand the effects of flow and water quality on
 28 beneficial uses.” *Id.* at p. 35.

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California has recently experienced one of the driest periods on record. Peltier Decl. at ¶ 6. CVP water allocations of water supply have been at record lows. In the October 2014-September 2015 water year, CVP agricultural water service contractors north and south of the Delta, including Westlands and other member agencies of the Authority, received a zero (0) percent allocation. Peltier Decl. at ¶ 6; Summary of Water Supply Allocations, Exh. 1 to Nelson Decl. Municipal and industrial CVP water users south of the Delta, including Authority member City of Tracy, received a contract allocation of either minimum “health and safety” needs or 25 percent of historical use, whichever is greater. *Id.* The allocations for the Exchange Contractors, including Authority members Central California Irrigation District and Firebaugh Canal Water District, and for Authority member Grassland Water District, which serves wildlife refuges, was less than 55 percent, notwithstanding the fact that these contractors are supposed to receive no less than a 75 percent allocation. *Id.*

To help alleviate the effects of the ongoing drought, in 2014 and 2015 the Governor issued proclamations and executive orders directing, among other actions, that the Water Board “consider modifying requirements for reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan.” Jan. 17, 2014 Proclamation of a State of Emergency, Exh. 1 to Leeper Declaration; *see also* Apr. 25, 2014 Proclamation of a Continued State of Emergency, Exh. 2 to Leeper Declaration; December 22, 2014, Executive Order B-28-14, Exh. 3 to Leeper Declaration; April 1, 2015 Executive Order B-29-15, Exh. 4 to Leeper Decl. The January Drought Proclamation explained that allowing such changes to conditions on water rights, “would enable water to be conserved upstream later in the year to protect cold water pools for salmon and steelhead, maintain water supply, and improve water quality.” Jan. 17, 2014 Proclamation of a State of Emergency, Exh. 1 to Leeper Declaration. The proclamations and executive order suspended the requirements of Water Code section 13247 (which requires “state offices, departments and boards” to “comply with” water quality control plans), because strict compliance with water quality control plan requirements would “prevent, hinder, or delay the mitigation of the effects of the emergency.” *Id.*

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Consistent with the Governor's drought proclamations and executive orders, in 2014 and 2015 the California Department of Water Resources ("DWR") and Reclamation jointly filed several Temporary Urgency Change Petitions to temporarily modify water rights conditions for the State Water Project ("SWP") and CVP, in an effort to conserve the SWP and CVP water supplies. *See* Peltier Decl. at ¶ 9; *see also* Declaration of Jose Gutierrez in Support of Motion to Intervene ("Gutierrez Decl.") at ¶ 5. The change petitions requested temporary modification of conditions included in Reclamation and DWR's SWP and CVP water rights that require the projects to operate to meet certain water quality objectives established by the Bay Delta WQCP.² *Id.* The requested changes involved, for example, modifying water right conditions pertaining to Delta outflow, Delta inflow, San Joaquin River flow, Delta Cross Channel Gate closure, and export limits conditions. *See e.g.* Feb. 3, 2015 Water Board Order Approving in Part and Denying in Part a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions, Exh. 6 to Leeper Declaration; Dec. 15, 2015 Water Board Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections, Exh. 6 to Leeper Decl.; *see also* Gutierrez Decl. at ¶ 5. These changes were requested to conserve storage in upstream reservoirs, protect public health and safety, and lessen the critical losses to agricultural, municipal, industrial, and wildlife uses due to the severe water shortages resulting from the drought. *Id.*

The Water Board, through its Executive Director, issued a series of orders approving in part and denying in part the change petitions for the CVP and SWP. *See* Peltier Decl. at ¶10; *see also* Gutierrez Decl. at ¶ 6; Exh. 6 to Leeper Declaration (Feb. 3, 2015 Temporary Urgency Change Order). Those orders have provided relief from certain water right conditions and allow Reclamation to conserve scarce CVP water supplies. *Id.* The affected water right conditions were not eliminated entirely, but instead were temporarily modified. DWR has reported to the Water Board that the relief granted by the Water Board has allowed the CVP and SWP to conserve 282,000 acre-feet in upstream storage for the period January 2015 through April 30, 2015. Peltier

² The procedure and standards for temporary changes to water rights permits are set forth in California Water Code section 1725 et seq.

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Decl. at ¶ 10; Exh. 3 to Peltier Decl.

The Complaint alleges, incorrectly, that the Water Board “made numerous revisions to the water quality standards” in the Bay-Delta WQCP or Water Quality Control Plan for the Central Valley in the series of orders. (Id. at ¶ 42.) It identifies nine orders issued by the Water Board as making plan revisions, the earliest issued January 31, 2014 and the most recent issued April 19, 2016. (Complaint ¶¶ 43-51.) In fact, these orders temporarily amended water rights conditions, not the water quality objectives in either plan.

C. Proposed Intervenor San Luis & Delta-Mendota Water Authority

The Authority was formed in 1992 as a joint powers authority, and has its principal office in Los Banos, California. Peltier Decl. at ¶ 2. The Authority was formed for the purposes of representing the common interests of its member agencies relating to their CVP water supplies, and assuming operation and maintenance responsibilities for certain CVP facilities in their region. Peltier Decl. at ¶¶ 2-4. It is comprised of 28 member water agencies, 26 of which contract with the Reclamation for approximately 3 million acre-feet of water stored, pumped and conveyed by the CVP. Peltier Decl. at ¶¶ 2, 5.

The water supplied to the Authority’s member agencies is pumped from the Delta through the Jones Pumping Plant and has been used to meet the water supply needs of over 1.2 million acres of agricultural lands within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito and Santa Clara Counties. Peltier Decl. at ¶ 5. Member agencies also provide water to approximately 100,000 acres of managed wetlands and wildlife refuges for habitat enhancement and restoration activities. *Id.* Finally, these water supplies support municipal and industrial uses by almost 2 million people within the service areas, including within the City of Tracy and urban areas within Santa Clara County. *Id.*

The Authority operates and maintains certain CVP facilities under a contract with Reclamation. Peltier Decl. at ¶ 4. One such facility is the Jones Pumping Plant, located in the southern portion of the Delta, near the City of Tracy. *Id.* The Authority also operates and maintains the Delta-Mendota Canal, which delivers water to member agencies. *Id.*

DRAFT**D. Proposed Intervenor Westlands Water District**

Westlands is a California water district formed pursuant to California Water Code sections 34000 et seq., and is authorized to intervene in any proceeding involving or affecting the ownership or use of water within the district, or its water supplies. Cal. Wat. Code, §§ 35408, 35409; Gutierrez Decl. at ¶ 2. Westlands is comprised of over 600,000 acres of farmland within areas of Fresno and Kings Counties, on the west side of the San Joaquin Valley, including some of the most productive agricultural lands in the world. Gutierrez Decl. at ¶ 2. Westlands holds vested contractual rights to receive up to 1.195 million acre-feet of CVP water per year, subject to water availability and other factors. *Id.* at ¶ 3.

Since 1990, Reclamation has struggled to operate the CVP to fully satisfy the CVP's multiple, and sometimes conflicting, purposes. In all years except two in the past twenty-five, Westlands has received less—and indeed in over half of those years has received fifty percent or less—than its full contractual entitlement to CVP water. *See* Gutierrez Decl. at ¶¶ 4, 6. In water year 2015—and for the second consecutive year—Westlands received a zero percent allocation. *Id.* at ¶ 4.

E. The Relief Plaintiffs Seek Would Harm The Proposed Intervenor's Interests In CVP Water Supplies

The Proposed Intervenor has a direct interest in CVP water supplies and ensuring that Reclamation can seek and obtain from the Water Board changes to CVP water right conditions needed to conserve and best use CVP water supplies in response to drought or other exigent circumstances. *See* Peltier Decl. at ¶¶ 12, 13; Gutierrez Decl. at ¶¶ 7-9. This litigation threatens those interests. *Id.* The relief sought by Plaintiffs would delay and impede Reclamation's ability to promptly obtain temporary permit amendments, by adding EPA review and approval to the Water Board's review and approval. *Id.*

III. ARGUMENT

Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as of right. That rule states, in relevant part:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the

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property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has outlined four requirements for intervention under Rule 24(a): (1) a timely application; (2) a significantly protectable interest relating to the subject of the litigation; (3) disposition of the lawsuit may adversely affect the applicant's interest if intervention is not granted; and (4) inadequate representation by the existing parties to the action. *United States v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *Friant Water Authority v. Jewell*, 2014 WL 2197942 at *2 (E.D. Cal. May 27, 2014). In considering motions under Rule 24(a)(2), the Ninth Circuit is guided "primarily by practical and equitable considerations," and it interprets the legal standard broadly in favor of intervention. *Donnelly v. Glickman*, 159 F.3d 405, 408 (9th Cir. 1998); *State of Wash.*, 86 F.3d at 1503 ("Rule 24(a) is construed broadly in favor of intervention"). Further, the showing in support of a motion to intervene is weighed under a standard favoring the movant: "Courts are to take all well-pleaded, non-conclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). The Proposed Intervenors meet the requirements for intervention as of right under Rule 24(a).

A. The Proposed Intervenors Should Be Granted Intervention As Of Right

1. This Motion Is Timely

Whether a motion to intervene is timely turns on three considerations: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002); *State of Wash.*, 86 F.3d at 1503.

The Proposed Intervenors' motion is timely under these criteria. Plaintiffs filed their Complaint on April 22, 2016. The Defendants have not answered the Complaint. The Court has issued no substantive orders. No initial case management conference has yet been held. Proposed

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Intervenors are seeking to intervene at the outset of this litigation, before any substantive briefing has been done or any determinations have been made regarding the issues raised by the Complaint. *See, e.g., California Trout, Inc. v. U.S. Bureau of Reclamation*, --- F. Supp. 3d ----, 2015 WL 4477831 at *11 (C.D. Cal. June 22, 2015) (motion to intervene was timely where the court had “not yet substantively engaged in the issues in the case . . . and the Motion to Intervene was filed before defendants responded to the Complaint”). There has been no delay; Proposed Intervenors’ motion is timely.

2. The Proposed Intervenors Have Significantly Protectable Interests Relating To CVP Operations And Water Supplies

Rule 24(a)(2) requires that an applicant for intervention have a protectable interest “relating to” the subject of the lawsuit. “Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.” *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). “It is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.” *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). The Proposed Intervenors meet this requirement.

Plaintiffs seek declaratory relief that Defendants violated the Act by not reviewing the Water Board’s orders, and injunctive relief requiring Defendants to review such orders in the future and to “notify” the Water Board that such amendments to CVP water rights must be reviewed and approved by EPA before being implemented. (Complaint, Prayer ¶¶ A-C.) If granted, this relief would foreclose Reclamation from timely obtaining temporary relief from operating under the water right conditions related to the water quality objectives in the Bay Delta WQCP. That loss of flexibility for CVP operations would impair Reclamation’s ability to serve CVP purposes, and potentially reduce the quantity of CVP water available for delivery to Authority members and to the farms, families and wetlands and wildlife refuges that they serve. *See Peltier Decl.* at ¶¶ 12, 13; *Gutierrez Decl.* at ¶¶ 6-9. Thus, the Proposed Intervenors’

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1 protectable interests in CVP water supplies are directly at stake in this litigation. *Id.*

2 **(a) The Authority's Member Agencies Have A Protectable Interest**
3 **In CVP Water Supply**

4 The Authority's member agencies, including Westlands, have significant contractual and
5 other legally protectable rights to CVP water. *See* Peltier Decl. at ¶¶ 2, 5; Gutierrez Decl. at ¶ 3.
6 Twenty-six of the Authority member agencies hold contracts with the United States for CVP water
7 supplies. Peltier Decl. at ¶ 2. "Contract rights are traditionally protectable interests supporting
8 intervention as of right." *Southwest Center*, 268 F.3d at 820. Reclamation has assumed
9 contractual duties, and the contractors have acquired contractual rights, pursuant to the CVP
10 contracts. *Westlands Water Dist. v. United States*, 805 F. Supp. 1503, 1511-12 (E.D. Cal. 1992).
11 As a result of that assumption of duties and acquisition of rights, the Authority's member
12 agencies, including Westlands, hold legally protectable interests in CVP water. *See Laub v.*
13 *United States Department of the Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) (recognizing that an
14 adverse impact to CVP water supplies is an "invasion of a legally protected particularized
15 interest").

16 **(b) These Protectable Interests Support Intervention In This Action**

17 Under Ninth Circuit precedent, an entity whose contractual entitlements may be impaired
18 as a result of the outcome of litigation has a "protectable interest" for purposes of intervention.
19 *Southwest Center*, 268 F.3d at 820. In *Southwest Center for Biological Diversity v. Berg*, the
20 Ninth Circuit found that contractually-based interests in a development project supported
21 intervention in an Endangered Species Act ("ESA") suit. In that action, environmental groups
22 sued the United States and the City of San Diego to challenge conservation plans and a permit that
23 allowed development of lands inhabited by endangered species, based on alleged violations of the
24 ESA. A construction company and several building trade associations moved to intervene. *Id.* at
25 817. The district court denied their motion, holding they had failed to prove a protectable interest,
26 and failed to sufficiently prove that their projects would be affected by the litigation. *Id.* at 818.

27 The Ninth Circuit reversed. It held that the construction company had sufficiently shown
28 that five construction projects that the construction company had ongoing could be affected if the

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conservation plan and incidental take authority provided by the plan were invalidated, and that this raised “sufficient legally protectable interests to support intervention as of right.” *Id.* at 820. The Ninth Circuit found that the trade associations had likewise established a legally protectable interest that could be affected, based on allegations that their members had projects in the permit approval pipeline that depended on the challenged plan for their incidental take authority. *Id.* at 821-822. The Ninth Circuit found that the district court erred by failing to accept as true the movants’ allegations of a protectable interest and a relationship between the litigation and that interest. *Id.* at 810.

The Proposed Intervenor have a similarly substantial interest in this action. The Proposed Intervenor hold protectable interests in CVP water supplies that are protected by contract and by statute. *See* Peltier Decl. at ¶¶ 2, 5; Gutierrez Decl. at ¶ 3. These interests are related to this action because Plaintiffs seek to require EPA review and approval of temporary changes to CVP water rights permits, and that would delay and complicate obtaining such changes. *See* Peltier Decl. at ¶¶ 12, 13; Gutierrez Decl. at ¶¶ 7-9.

In sum, the Proposed Intervenor have legally protectable interests relating to the subject of the action, and therefore the Proposed Intervenor meet the second requirement for intervention as of right.

3. **Disposition Of This Matter May, As A Practical Matter, Impair Or Impede The Proposed Intervenor’s Ability To Protect Their Interests**

Rule 24(a)(2) requires that “disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest.” *Citizens for Balanced Use v. Montana Wilderness*, 647 F.3d 893, 897 (9th Cir. 2011) (quoting *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)). This burden is minimal. A would-be intervenor must show only that impairment of its legal interest is possible if intervention is denied. *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Courts often follow the guidance of the Advisory Committee notes for the 1966 amendments to Rule 24(a), which state that “[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.” Fed. R. Civ. P. 24 Advisory Committee notes to 1966 amendments; *see Southwest*

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Center, 268 F.3d at 822 (quoting and following the 1966 Amendment Committee Notes).

If the Court were to enter the judgment requested by Plaintiffs in the Proposed Intervenor's absence, the Proposed Intervenor would have no effective means to avoid the impact of that judgment through separate, collateral proceedings. The EPA would be bound to comply with the judgment, and hence would seek to review and approve changes to the water rights permits for the CVP that affect implementation of Bay Delta water quality objectives. To protect their interests, therefore, as a practical matter the Proposed Intervenor must participate in this action. In sum, the Proposed Intervenor meet the requirement that intervention is necessary to protect their interests.

4. The Proposed Intervenor's Interests May Not Be Adequately Represented By The Existing Parties To This Matter

The fourth and final element necessary for intervention is inadequate representation by the existing parties. A person seeking to intervene bears the burden of establishing that his interest may not be adequately protected by the existing parties to the action. Meeting this burden "is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki v. Cayetano*, 324 F.3d at 1086). A court evaluating adequacy of representation examines three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id.* "The 'most important factor' in assessing the adequacy of representation is 'how the interest compares with the interests of existing parties.'" *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d at 1086).

Here, the Proposed Intervenor represent specific concerns of CVP contractors and water users not represented by any other party. Ultimately, it is CVP contractors, like the Authority's member agencies and their water users, who will suffer the consequences of reduced CVP water supplies, not the EPA. Federal Defendants cannot be expected to adequately represent the more narrowly focused concerns of the Proposed Intervenor. [There may be more recent authority re

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inability of Government agency defendants to represent others.] See *Southwest Center*, 268 F.3d at 823 (noting that the U.S. Fish and Wildlife Service, “a federal agency . . . cannot be expected under the circumstances presented to protect these private interests [of the Proposed Intervenor]”); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002) (holding that “a federal defendant with a primary interest in the management of a resource [does not have] interests identical to those of an entity with economic interests in the use of that resource”); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (permitting timber industry to intervene as defendants in case brought against the government by environmental groups because “[t]he government must represent the broad public interest, not just the economic concerns of the timber industry”). Certainly, the Proposed Intervenor’s interests will not be adequately represented by Plaintiffs, who apparently seek to prevent or at least burden temporary water rights changes, to the detriment of CVP contractors.

In conclusion, the Proposed Intervenor meets all the requirements for intervention as of right. The Proposed Intervenor respectfully request this Court grant intervention as of right pursuant to Rule 24(a).

B. In The Alternative, The Proposed Intervenor Should Be Granted Permissive Intervention

Rule 24(b) provides in pertinent part that “the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b).

As discussed above, this motion is timely. The Proposed Intervenor’s defenses raise common questions with the Plaintiffs’ action, insofar as the Proposed Intervenor seeks to defend against Plaintiffs’ action together with the Defendants. Further, because the Proposed Intervenor seeks to defend against Plaintiffs’ claims, the Proposed Intervenor’s answer is necessarily within the Court’s supplemental jurisdiction over matters that are part of the same “case or controversy.” 28 U.S.C. § 1367(a) (“supplemental jurisdiction shall include claims that involve the . . . intervention of additional parties”).

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The Court should exercise its discretion to allow intervention by the Proposed Intervenor. This action involves the Proposed Intervenor's vital interests in CVP water supplies. The Proposed Intervenor will provide a perspective not represented by the existing parties. Accordingly, the Proposed Intervenor should be granted leave to intervene.

IV. CONCLUSION

For the foregoing reasons, the Proposed Intervenor respectfully request that this Court grant them intervention as a matter of right, or in the alternative, permissive intervention.

Dated: April __, 2016

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By: */s/ Daniel J. O'Hanlon*

Daniel J. O'Hanlon
Attorneys for Defendant-Intervenor, SAN LUIS
& DELTA-MENDOTA WATER AUTHORITY
and WESTLANDS WATER DISTRICT